UNITED STATES OF AMERICA	)	
	)	**Prosecution Response to**
v.	)	
	)	**Defense Motion to Dismiss Specification 1**
Manning, Bradley E.	)	**of Charge II for Failure to**
PFC, U.S. Army,	)	**State an Offense**
HHC, U.S. Army Garrison,	)	
Joint Base Myer-Henderson Hall	)	**12 April 2012**
Fort Myer, Virginia 22211	)	

RELIEF SOUGHT

The prosecution respectfully requests the Court deny the Defense Motion to Dismiss Specification 1 of Charge II for Failure to State an Offense (the "Defense Motion") because Specification 1 of Charge II (the "Article 134 offense") is neither preempted by Article 104, UCMJ, nor punishable under Article 92, UCMJ. The prosecution also requests the Court make findings as to the elements of the Article 134 offense.

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the Defense bears the burden of persuasion and must prove any factual issues necessary to decide this motion by a preponderance of the evidence. See Manual for Courts-Martial (MCM), United States, Rule for Courts-Martial (RCM) 905(c) (2008).

FACTS

The prosecution stipulates to those facts set forth in paragraphs 3-4 of Defense Motion, except for the statement that the "case has been referred to a general court martial by the convening authority with a special instruction that the case is not a capital referral." Def. Mot. at 1. The above-captioned case was referred to a general court-martial without special instructions. The prosecution further disputes any argument contained therein.

The Specification of Charge I (the "Article 104 offense") reads that the accused, "without proper authority, knowingly [gave] intelligence to the enemy, through indirect means." Enclosure 1.

The Article 134 offense reads that the accused "wrongfully and wantonly cause[d] to be published on the internet intelligence belonging to the United States government, having knowledge that intelligence published on the internet is accessible to the enemy, such conduct being prejudicial to good order and discipline in the armed forces and being of a nature to bring discredit upon the armed forces." Enclosure 1.

U.S. Department of the Army, Pam. 27-9, Military Judges' Benchbook (1 January 2010) (Benchbook), lists the following elements for the Article 134, Uniform Code of Military Justice (UCMJ), offense relating to Specification 1 of Charge II:

(1) That (state the time and place alleged), the accused (here state the act, conduct, or omission alleged); and

(2) That, under the circumstances, the conduct of the accused was (to the prejudicial of good order and discipline in the armed forces) (or) (of a nature to bring discredit upon the armed forces).

The Benchbook lists the following elements for Giving Intelligence to the Enemy under Article 104(2):

(1) That (state the time and place alleged), the accused, without proper authority, knowingly gave intelligence information to (a) certain person(s), namely: (state the name or description of the enemy alleged to have received the intelligence information);

(2) That the accused did so by (state the manner alleged);

(3) (state the name or description of the enemy alleged to have received the intelligence information) was an enemy; and

(4) That this intelligence information was true, at least in part.

WITNESSES/EVIDENCE

The prosecution does not request any witnesses be produced for this Motion. The prosecution requests that the Court consider the following enclosures to this Motion in its ruling.

1. Charge Sheet (already provided in record)
2. Government Response to Defense Bill of Particulars, 8 March 2012 (Appellate Exhibit XIV)
3. Army Regulation 380-5, Paragraph 1-21a

LEGAL AUTHORITY AND ARGUMENT

The prosecution requests that the Court deny the Defense Motion because the Article 134 offense is neither preempted by Article 104 nor punishable under Article 92.

I: THE ARTICLE 134 OFFENSE IS NOT PREEMPTED BY ARTICLE 104.

Military courts adopt a two-part test for determining whether the preemption doctrine applies. See United States v. Wright, 5 M.J. 106, 110-11 (C.M.A. 1978). The test is as follows: first, "whether Congress intended to limit prosecution for wrongful conduct within a particular area or field to offenses defined in specific articles of the Code; [and second] whether the offense charged is composed of a residuum of elements of a specific offense and asserted to be a violation of...Article 134[.]" Id., at 110-11. The preemption doctrine "requires an affirmative

answer to [both] questions." Id., at 110. In Anderson, the Court of Appeals for the Armed Forces (CAAF) squarely answered both questions as they relate to this case in the negative. See United States v. Anderson, 68 M.J. 378, 387 (C.A.A.F. 2010).

A. The CAAF in Anderson Concluded that Congress Did Not Intend to Limit Prosecution of the Accused's Misconduct to Article 104.

The preemption doctrine does not apply, unless "Congress intended the other punitive article to cover a class of offenses in a complete way." United States v. Kick, 7 M.J. 82, 85 (C.M.A. 1979). Military courts "require[] Congress to indicate through direct legislative language or express legislative history that particular actions or facts are limited to the express language of an enumerated article, and may not be charged under [another punitive article]." See Anderson, 68 M.J. at 387. Military courts are "extremely reluctant to conclude that Congress intended [] provisions to preempt [an] offense...in the absence of a *clear showing* of a contrary intent." Kick, 7 M.J. at 85 (emphasis added) (stating that there is no congressional intent to preempt offense of negligent homicide from spectrum of punishable criminal homicides); see also United States v. Erickson, 61 M.J. 230 (C.A.A.F. 2005) ("[T]he legislative history of Article 112a reflects congressional intent to not cover the class of drug-related offenses in a complete way."); see also United States v. McGuinness, 35 M.J. 149 (C.M.A. 1992) ("[N]othing in the legislative history of Article 92 and 134 indicat[e] that Congress intended that general orders would preempt offenses made applicable to the military [under] Article 134."). The defense argues that Congress clearly intended Article 104 to occupy the field of aiding or communicating with the enemy. This argument conflicts with the CAAF ruling in Anderson. See id., at 387.

The CAAF in Anderson concluded Article 104 did not preempt an Article 134 offense for distributing sensitive material to individuals not authorized to receive it. See id., at 386-7.[1] In Anderson, the appellant provided comprehensive information about his unit's pending deployment to a purported Muslim extremist through a series of email communications. The purported "extremist," a concerned American citizen, notified the Federal Bureau of Investigation (FBI) who opened an investigation and began communicating with the appellant. The appellant later provided undercover FBI agents, posing as al Qaeda operatives, computer diskettes containing classified information on the vulnerabilities of military operations. The appellant was convicted of attempting to give intelligence to the enemy, attempting to aid the enemy, and conduct prejudicial to good order and discipline. See id.

On appeal, the appellant argued that Article 104 preempted the Article 134 offense. The CAAF denied this argument, concluding that "the legislative history of Article 104 does not clearly indicate that Congress intended for offenses similar to those at issue [i.e., the distribution of sensitive material to individuals not authorized to receive it] to only be punishable under Article 104 to the exclusion of Article 134." Id., at 387; see also UCMJ art. 104 (2008); see also

[1] In Anderson, the appellant was charged with violating, *inter alia*, Article 104, by "attempt[ing] to, without proper authority, knowingly give intelligence to the enemy, by disclosing true information to [persons] whom the [appellant] thought were Tariq Hamdi and Mohammed, members of the al Qaida terrorist network," and Article 134, by "wrongfully and dishonorably provid[ing] information on U.S. Army troop movements...to [persons] whom the [appellant] thought were Tariq Hamdi and Mohammed, members of the al Qaida terrorist network, such conduct being prejudicial to good order and discipline in the armed forces, and of a nature to bring discredit upon the armed forces." Anderson, 68 M.J. at 378.

UCMJ art. 134 (2008). The CAAF noted that its "reasoning could just as easily be applied to the distribution of information to individuals who are not necessarily the enemy, such as a newspaper report or...the private citizen who first encountered appellant [online]." Id., at 387 ("if this distinction was not permissible...Congress was free to clearly state that Article 104 supersedes Article 134 in this context"). Here, the accused is charged with causing intelligence to be published on the internet in violation of Article 134, an offense within the reasoning of the CAAF in Anderson.

Accordingly, this Court should answer the first prong of the preemption doctrine in the negative. The Article 134 offense is not preempted by Article 104.

B. The Article 134 Offense is Not Composed of a Residuum of Elements of a Specific Offense and Asserted to be a Violation of Article 134, UCMJ.

Even assuming, *arguendo*, the Court finds that Congress intended Article 104 to preempt the conduct underlying the Article 134 offense, the preemption doctrine does not apply because the Article 134 offense is not composed of a residuum of those elements for Article 104. The prosecution respectfully requests that the Court make findings with respect to the elements of the Article 134 offense consistent with those enumerated in the Benchbook. The prosecution requests that the Court adopt the following elements to the Article 134 offense:

> (1) That the accused did, at or near Contingency Operating Station Hammer, Iraq, between on or about 1 November 2009 and on or about 27 May 2010, cause to be published on the internet intelligence belonging to the United States government;
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> (2) That the accused did so wrongfully and wantonly;
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> (3) That the accused had knowledge that intelligence published on the internet is accessible to the enemy; and
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> (4) That, under the circumstances, the conduct of the accused was to the prejudicial of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces.

The purpose of the preemption doctrine is to "prevent a prosecutor from circumventing an essential element of an offense under the Code." United States v. Wagner, 52 M.J. 634, 637 (N-M. Ct. Crim. App. 1999); see also McGuinness, 35 M.J. at 152 ("the underlying basis for the preemption doctrine is Congress' and this Court's longstanding unwillingness to permit prosecutorial authorities 'to eliminate vital elements from common law crimes and offenses expressly defined by Congress and permit the remaining elements to be punished as an offense under Article 134" (citing United States v. Norris, 1953 WL 1616 (C.M.A. 1953)); but see also Erickson, 61 M.J. at 233 ("[S]imply because the offense charged under Article 134 embraces all but one element of an offense under another article does not trigger operation of the preemption doctrine."). Here, the Article 104 offense and the Article 134 offense consist of different elements of proof, targeting distinct courses of criminal conduct.

The Article 134 offense is not composed of a residuum of elements of the Article 104 offense. First, each offense requires a different *mens rea*. See Enclosure 1. The Article 134 offense requires that the accused "wrongfully and wantonly" caused to be published on the internet intelligence belonging to the United States government.[2] In contrast, the Article 104 offense requires that the accused "knowingly" gave intelligence to the enemy.[3] Second, the Article 134 offense requires proof that the accused caused intelligence to be published on the internet. The Article 104 offense has no such element. See United States v. Kowalski, 69 M.J. 705, 707 (C.G. Ct. Crim. App. 2010) (holding that Articles 125 and 120 are not preempted by Article 134 because those punitive articles "have an obvious additional element"); see also United States v. Tenney, 60 M.J. 838, 842 (N-M. Ct. Crim. App. 2005) ("[T]he federal bank fraud statute is not a residuum of elements of larceny, but rather, requires that the Government prove an additional element, namely, that the appellant defrauded a financial institution."). The Government's Response to Defense Bill of Particulars does not create this element for the Article 104 offense. See Enclosure 2; see also United States v. Fosler, 70 M.J. 225, 245 (C.A.A.F. 2011) (noting that the purpose of a bill of particulars is to provide notice to the defense). Third, the Article 134 offense requires the misconduct to be "prejudicial to good order and discipline in the armed forces and [] of a nature to bring discredit upon the armed forces." See Enclosure 1; see also Fosler, 70 M.J. at 230 (stating that the three clauses of Article 134 are three distinct and separate parts); see also Kowalski, 69 M.J. at 707 (Articles 125 and 120 are not preempted by Article 134 because those punitive articles "have an obvious additional element"). Fourth, the Article 134 offense requires that the accused had knowledge that intelligence published on the internet is accessible to the enemy. See id. Fifth, the act underlying the Article 134 offense is different than the act underlying the Article 104 offense. The Article 134 offense requires the act of causing intelligence to be published on the internet, and the Article 104 offense requires the act of giving intelligence to the enemy. See Enclosure 1. Black's Law Dictionary defines the act of giving as "to voluntarily transfer to another without compensation" and the act of causing as "to bring about or effect." Black's Law Dictionary (9th ed. 2009). And lastly, the Article 104 offense requires an additional element of receipt of intelligence by the enemy; the Article 134 offense does not. In sum, the charges share few, if any, elements.

As in Anderson, the Article 104 and Article 134 offenses may encompass "parallel facts" yet are "nevertheless directed at distinct conduct." See Anderson, 68 M.J., at 387. In Anderson, "the charges were based on a single transmission of information to those appellant believed to be the enemy." Id., at 380. Here, the charges are based on a series of transmissions of information, yet are directed at distinct criminal conduct. See Enclosures 1-2; see also United States v. Canatelli, 5 M.J. 838, 841 (A.C.M.R. 1978) (noting that the preemption doctrine does not apply

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[2] "'Wanton' includes 'reckless,' but...may, in a proper case, connote willfulness, or a disregard of probable consequences, and thus describe a more aggravated offense." UCMJ art. 111(c)(8) (2008) (defining "wanton" under Article 111, UCMJ); see also Model Penal Code Section 2.02(2)(c) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantially and unjustifiable risk that the material element exists or will result from his conduct.").

[3] "A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result." Model Penal Code Section 2.02(2)(b).

when the offenses are separate and distinct crimes). The defense argues the charges are aimed at the exact same conduct – the accused's alleged publication of United States intelligence information on the internet. To the contrary, the Article 134 offense addresses misconduct that is distinct from the misconduct covered under the Article 104 offense. The Article 134 offense is directed to hold a Soldier criminally liable for causing intelligence to be published on the internet, with the knowledge that intelligence published on the internet is accessible to the enemy, without any requirement of the enemy being in possession of the intelligence. The Article 104 offense is directed to hold a Soldier criminally liable for knowingly giving intelligence to the enemy. See Canatelli, 5 M.J. at 841.

Accordingly, this Court should answer the second prong of the preemption doctrine in the negative. The Article 134 offense is not preempted by Article 104.

II: THE OFFENSE FOR WHICH THE ACCUSED IS CHARGED IS NOT PUNISHABLE UNDER ARTICLE 92.

In the alternative, the defense argues that the Article 134 offense must be charged as a violation of Article 92, UCMJ, in light of Army Regulation (AR) 380-5, para. 1-21a. See Enclosure 3. The defense bases its argument largely upon the Air Force Court of Criminal Appeals ruling in Borunda. See United States v. Borunda, 67 M.J. 607 (A.F. Ct. Crim. App. 2009). In Borunda, the court held that "when a lawful general order or regulation proscribing the [offense] exists, an order or regulation which by definition is punitive, the [offense], if charged, will only survive legal scrutiny as a violation of Article 92(1) and not as a violation of Article 134." Id., at 609. Where a lawful general order or regulation does not exist, the prosecutor is "at legal liberty to charge the [accused's offense] as a violation of Article 92(3), UCMJ, or Article 134, UCMJ[.]" Id., at 609-10. Here, no lawful general order or regulation exists that governs the specific misconduct which serves as a basis for the Article 134 offense.

The Article 134 offense is distinct from an Article 92 offense under AR 380-5, para. 1-21a, for many reasons. See UCMJ art. 92 (2008). First, AR 380-5, para. 1-21a, subjects Department of Army personnel to sanctions, not limited to UCMJ action, if they "disclose *classified or sensitive information* to unauthorized persons."[4] Enclosure 3 (emphasis added). Proving information is "classified or sensitive" requires, *inter alia*, proof that the information is classified or sensitive (e.g., a classification review). On the other hand, the accused is charged with, *inter alia*, causing to be published on the internet "*intelligence* belonging to the United States." Enclosure 1 (emphasis added). Intelligence is not limited only to classified or sensitive information. Accordingly, such misconduct falls outside the generalized misconduct proscribed under AR 380-5, para. 1-21a. Second, the *mens rea* under the Article 134 offense and AR 380-5 are different. The Article 134 offense requires that the accused acted "wrongfully and wantonly." Enclosure 1. AR 380-5, para. 1-21a, subjects Department of Army personnel to sanctions if they commit misconduct "knowingly, willfully, or negligently." Enclosure 3. Lastly, the Article 134 offense, as written, requires that the accused had "knowledge that intelligence published on the internet is accessible to the enemy." Enclosure 1.

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[4] Sanctions are not limited to UCMJ action, but also can include, without limitation, warning, reprimand, suspension without pay, forfeiture of pay, removal, discharge, loss or denial of access to classified information, and removal of original classification authority. See Enclosure 3.

In sum, the Article 134 offense captures more than classified or sensitive information and requires additional elements and a different *mens rea* than an Article 92 offense under AR 380-5, para. 1-21a. Accordingly, the prosecution is "at legal liberty to charge the [accused's offense] as a violation of Article 92(3), UCMJ, or Article 134[.]" Borunda, 67 M.J. at 609-10.

CONCLUSION

Based on the above, the prosecution requests that the Court deny Defense Motion to Dismiss Specification 1 of Charge II for Failure to State an Offense because the Article 134 offense is neither preempted by Article 104 nor punishable under Article 92.

J. HUNTER WHYTE
CPT, JA
Assistant Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David E. Coombs, Civilian Defense Counsel, via electronic mail, on 12 April 2012.

J. HUNTER WHYTE
CPT, JA
Assistant Trial Counsel